

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANNA LOPEZ ALMAGUER,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 213859

Ingham Circuit Court

LC No. 98-073225-FH

Before: Murphy, P.J., and White and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of fourteen counts of embezzlement by an agent or trustee over \$100, MCL 750.174; MSA 28.371. Defendant was sentenced to fourteen concurrent terms of 36 to 120 months' imprisonment. The convictions arose out of defendant's use of funds belonging to a disabled woman over whose affairs she held a power of attorney. Defendant appeals as of right. We affirm.

First, defendant argues that she was denied a fair trial when the prosecution questioned her regarding uses of the victim's funds not specifically giving rise to any of the fourteen counts. Defendant argues that the questions introduced evidence of her prior bad acts, inviting the impermissible inference that because she committed other bad acts, she was bad person who also committed the charged acts. Ordinarily, we review a trial court's determination on the admissibility of evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, because defendant failed to object to this cross-examination, we review this issue for manifest injustice. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999).

MRE 404(b)(1) restricts the admissibility of evidence of other acts and provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or because of mistake or accident when the same is material, whether such other crimes, wrongs, or

acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The use of similar acts as evidence of a defendant's character is excluded, except as allowed by this rule, to avoid the danger of conviction based on a defendant's history of misconduct. *Starr, supra* at 494-495. The evidence must also be relevant under MRE 402 as enforced through MRE 104(b) and its probative value must not be substantially outweighed by the danger of unfair prejudice from it. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993). While MRE 404(b)(1) provides a "laundry list" of permissible trial uses for prior bad acts, it is actually a nonexclusive list of situations in which the evidence is probative of some fact other than the defendant's criminal propensity. *VanderVliet, supra* at 66; *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990).

Defendant was charged with fourteen counts of embezzlement, some of which arose out of particular expenditures by defendant, and others of which arose out of defendant's misappropriation of particular units of the victim's income. Under MCL 750.174; MSA 28.371, the prosecutor was obliged to show that the funds belonged to the victim, that defendant held a position of trust with the victim and thereby obtained control over the funds, and that defendant converted the funds to her own use or concealed them with the intent to convert them, with the intent to defraud or cheat the victim. *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996); *People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990). While the prosecutor was not required to show where or how defendant spent the money, evidence of defendant's expenditure of the money for her own benefit was highly relevant to establishing defendant's intent. Thus, under MRE 404(b), the disputed evidence could have been offered for the proper purpose of showing intent.

Additionally, the subject matter complained of would appear to fall within the "res gestae" exception to the general rule of MRE 404(b). Under the exception:

[E]vidence of prior "bad acts" is admissible where those acts are "so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Alternatively, "res gestae" has been defined as "the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978). [*People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).]

Because the uncharged purchases that defendant made with the victim's funds were closely intertwined with and helped explain the circumstances of those acts giving rise to some of the counts against her, the trial court would not have abused its discretion in admitting the other acts as part of the res gestae of the offenses. See *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990).

Additionally, defendant claimed that she spent the victim's money to benefit the victim or her daughter, or else defendant replaced the funds. On cross-examination, the prosecutor addressed defendant's direct examination testimony that she only used the funds properly by attempting to impeach

her testimony by establishing instances where defendant used the victim's funds for her own benefit. If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995); see also *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). Because she testified, defendant's credibility was in issue and the prosecutor did not violate MRE 404(b) by seeking to impeach her with her other purchases.

Thus, we conclude that the evidence was adduced for one or more proper purposes, and no error occurred in this regard. Any arguable error was not plain error and did not affect the fairness of the proceedings or deny defendant a fair trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). No manifest injustice appears on the record. *Cain, supra* at 127.

Next, defendant argues that the prosecutor unfairly vouched for one of the prosecution's witnesses. We disagree. We review preserved allegations of prosecutorial misconduct for whether the defendant established that an error more probably than not resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided case by case; the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; ___ NW2d ___ (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*; *Paquette, supra* at 341-342; *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts that a witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Otherwise improper prosecutorial remarks may not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

In his closing statement, defense counsel implied that one of the prosecution's witnesses, rather than defendant, had caused the victim's financial difficulties. In rebuttal, the prosecutor reviewed the evidence that supported the witness's credibility, including her demeanor on the witness stand, and commented that the witness struck one "as the kind of person who is simply too down to earth to lie." Defense counsel objected, and the trial court expressed its understanding that the comment related to the evidence and did not constitute vouching by the prosecutor. Considered in the context of defense counsel's argument and the prosecutor's rebuttal, the comment did not constitute a claim by the prosecutor to special knowledge regarding the witness's credibility. *Bahoda, supra* at 277. Further, because this was a bench trial, any arguable error was not of a magnitude that could have denied defendant a fair trial. *Paquette, supra* at 342. Error generally is less likely to require reversal in a bench trial because a judge is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling. *People v Edwards*, 171 Mich App 613, 619; 431

NW2d 83 (1988). Unlike a jury, a judge is presumed to possess an understanding of the law, which allows the judge to understand the difference between admissible and inadmissible evidence or statements of counsel. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992); *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Furthermore, defendant has not demonstrated that any error in this regard more probably than not resulted in the guilty verdict against her. *Lukity, supra* at 496.

Defendant finally argues that remand is necessary in order that the trial court can correct her PSIR, and forward the corrected copy to the Department of Corrections. At her sentencing hearing, defendant raised six challenges to statements in her PSIR. Although no indication of the court's response to these challenges appeared on the copy of the PSIR originally in the trial record, a corrected copy has now been included. We presume that this corrected copy has also been transmitted to the Department of Corrections. In the event this has not yet occurred, on release of this opinion we order the circuit court to so act. In all other regards, this final issue is moot.

Affirmed.

/s/ William B. Murphy

/s/ Helene N. White

/s/ William C. Whitbeck